Contributing Editors .....................................................................................260
Highlights ........................................................................................................... 135
Board of Directors ..........................................................................................135
ATLP National Committees ..............................................................................136
Journal Contributing Editors .........................................................................136
Editorial Advisory Committee .........................................................................136
Highlights Contributing Editors ......................................................................136
Chapter Activities ............................................................................................138
Editorial Policy .................................................................................................140
Manuscript Submissions ...................................................................................141
Permissions Policy Statement ..........................................................................141
Change of Address ..........................................................................................141
Student Writing Competition 2014 .................................................................142
Call for Papers .................................................................................................146
Guiding Philosophy of ATLP ...........................................................................148
State Action Addressing Classification and/or Misclassification of Transportation Workers – An Emerging Trend
Christian A. Davis, Esq. and Ross J. Ventre II, Esq........................................149
The D.C. Circuits Decision Vacating the Class Certification in the Rail Freight Surcharge Antitrust Litigation
Howard E. Shapiro, Esq. ................................................................................155
International Shipments and the Eroding Application of the Carmack Amendment
John E. Anderson, Sr. and Jonathan R. Patton ...............................................163
Put the Phone Down: At the End Of The Day What Do The New Rules On Texting And Cell Phone Use Mean To You?
Maureen E. Maney, Esq. and William H. Major III, Esq...............................171

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2014 LAW AND GRADUATE STUDENT TRANSPORTATION

WRITING COMPETITION

The Journal of Transportation Law, Logistics and Policy, which is published by the Association of Transportation Law Practitioners (“ATLP”), announces its 2014 law and graduate student writing competition, seeking quality articles related to transportation. The winning articles will be published in the Journal. ATLP’s members are composed of legal, academic, business and government experts in the field of transportation. The Journal, which has been published quarterly since 1935, contains academic-quality articles on timely subjects of interest to transportation academics, attorneys, government officials and a wide variety of policy leaders in the field. Articles in the Journal cover all modes and all aspects of transportation policy and law, including both freight and passenger issues, and matters of interest both nationally and internationally. Subscribers to the Journal include academic and legal experts, practicing attorneys, government officials, and many others.

Eligibility: The competition is open to all persons attending law school full or part time and all full or part time graduate students, with an interest in transportation law, logistics or policy.

Eligible Topics: For consideration in the competition, papers submitted may deal with any aspect of transportation law, logistics or policy. This includes topics related to any mode of transportation, domestic or international, freight or passenger.

Length and Format: Papers should be no longer than 10,000 words, and should conform to the Journal’s Standard Format (attached).

Selection of Winners: No more than two winners will be selected through blind review from the entries submitted. Entries will be reviewed by the members of ATLP’s Publications Committee and/or members of the Journal’s Editorial Advisory Committee, which is made up of persons expert in the field of transportation. The Review Committee’s decision will be final.

Prizes: Winning entries will be published in the Journal, and a cash award of $300 will be given to the author of each winning entry. The winning authors will have the opportunity to present their papers at ATLP’s Annual Meeting in June 2014; the
registration fee for the meeting will be waived, for both the student and the student’s advisor. Authors of the winning entry and the student’s advisor will also receive a complementary membership to ATLP for the next year.

Deadlines and Schedule: Papers must be submitted via email on or before April 1, 2014 to Lauren Michalski, ATLP Executive Director, at michalski@atlp.org. Winners will be notified on or before May 1, 2014. The winning papers will be published in the Second Quarter edition of the Journal, which is distributed at ATLP’s Annual Meeting in June of 2014.
Journal of Transportation Law, Logistics & Policy

Standard Format

1. All articles should be submitted in Microsoft Word. Please do not PDF the file.

2. Margins should be standard preset margins for 8.5 x 11.

3. Pages should be single-spaced, in Times New Roman font, no smaller than 11 points. Double space between paragraphs. Page numbers should be placed at the bottom of each page. The first line of each paragraph should be indented .5 inches. Case citations should be italicized.

4. Subheadings: All subheads should be flush with the left margin, with one line space above:

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7. The names of the authors should be listed directly below the title on the first page of the article. The current affiliations, mailing addresses, telephone numbers, and e-mail addresses of all authors should be contained at the bottom of the first page of the article, as a footnote to the names of the authors listed below the title.

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2014 CALL FOR PAPERS

The Journal of Transportation Law, Logistics & Policy invites persons interested in transportation policy, law or logistics to submit articles for publication. The Journal, which has been published quarterly since 1935 and is listed in Cabell's Directory (Management/Marketing), contains academic-quality articles on timely subjects of interest to transportation academics, attorneys, government officials and a wide variety of policy leaders in the field. Articles in the Journal cover all modes and all aspects of transportation policy and law, including both freight and passenger issues, and matters of interest both nationally and internationally. Subscribers to the Journal include academic and legal experts, practicing attorneys, government officials, and many others.

Over the past twelve months, the Journal has included such articles as:

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- "State Action Addressing Classification and/or Misclassification of Transportation Workers – An Emerging Trend, Christian Davis and Ross J. Ventre II, Esq., Weber Gallagher Simpson Stapleton Fires & Newby LLP
Please consider submitting your article to the Journal.

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We value, above all, our ability to serve our members.

We are committed to the highest standards of professional conduct.

In light of the changing transportation and logistics environment, we are committed to providing our members with timely information, ideas and opportunities for professional interaction to enable them to better serve their customers and clients.

Purpose

The purpose of the Association for Transportation Law, Logistics and Policy is to equip our members with the necessary tools to be vital resources for their companies, firms, customers and clients who compete in a constantly changing and increasingly global transportation and logistics marketplace. To accomplish this purpose, the Association will (a) provide educational offerings of the highest quality that are designed, among other things, to eliminate surprises and afford opportunities for the exchange of information among professionals involved in logistics and all modes of transportation; (b) encourage the highest standards of conduct among transportation and logistics professionals; (c) promote the proper administration of laws and policies affecting transportation and logistics; and (d) engage in continual strategic planning designed to maintain this association as the premier organization of its type in the world.

Vision

We are a global transportation and logistics organization, proud of our heritage, enthusiastic about our future and driven to exceed the expectations of our present and future members. We are leaders in providing educational opportunities, promoting transportation and logistics efficiencies, encouraging professional conduct and facilitating the free flow of information and exchange of ideas in the constantly changing and highly competitive transportation and logistics environment.

Our executive staff, national and local officers, committee members and members at-large participate in and take responsibility for doing whatever is necessary to enable each of our members to excel in the highly competitive, worldwide transportation and logistics marketplace in which we participate.
STATE ACTION ADDRESSING CLASSIFICATION AND/OR MISCLASSIFICATION OF TRANSPORTATION WORKERS— AN EMERGING TREND

Christian A. Davis, Esquire

Recently, there has been an increasing focus by state governments across the United States on addressing employer misclassification of assorted categories of workers, including transportation workers, due to the significant economic ramifications involved. This focus has resulted in some states taking up legislative action to address the issue. This article provides insight on the impact of misclassification of workers in the transportation industry by reviewing the background of misclassification; discusses recent case law dealing with transportation workers, as well as recent legislative action by one state, Pennsylvania, and forecasts a possible future for both employers and employees.

At its most basic level, misclassification of workers involves the concept of the label of the job not coinciding with the work performed by the actual employee. Common practices can include labeling a worker as an independent contractor; identifying a worker with a lower value job classification for insurance rate setting purposes; and, finally, initially classifying a worker correctly before later increasing the worker’s employment tasks without notifying the insurer.

Who has a motive to misclassify? The reality is that employers, both large and small, do have motivation to misclassify. The reasons are varied and complex, but one is a “perceived” cost savings. The perceived cost savings include potentially smaller payments for state workers’ compensation premiums; payment of less unemployment taxes; payment of less federal taxes; and not having to pay for costly employee benefits and overtime wages, all of which can reduce a company’s operating costs.

Some employers believe that such savings provides them with a competitive advantage. This potential competitive advantage seems all the more important in today’s struggling economy, with its constant threat of recession. On the flip side, employers may engage in misclassification simply to remain on a level playing field with competitors who may have been previously engaging in such conduct.

Misclassification is receiving increased attention because, in part, of the significant lost tax revenue involved. The IRS estimates that nearly three billion dollars is lost annually as the result of unpaid Social Security taxes, unemployment insurance taxes, and income taxes, because of misclassification. In addition, state and local governments are

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also losing hundreds of millions of dollars. For example, it is estimated that the state of New York, on average, loses over $175 million each year in unemployment tax revenue as the result of employee misclassification. In 2004, Massachusetts estimated losses to include: $12.6 to $35 million to the state’s unemployment insurance system; $91 million to the state income tax revenue; and $91 million in unpaid workers’ compensation premiums.

Misclassifying can also have significant non-economic implications on the workers themselves. For example, misclassification can deny many workers various protections and benefits to which they would be otherwise entitled to under state and federal law. Worker misclassification can also disrupt labor markets by enabling employers to ignore labor standards afforded to actual employees.

As the result of the serious documented economic and non-economic effects of misclassification, various state governments have gone so far as to create task forces to research and identify misclassification. States are also starting to cooperate with the IRS in identifying entities that knowingly and purposely misclassify workers.

Two recent cases involving transportation workers highlight the possible damages for employers who are accused of misclassification: Sherman v. American Eagle Express Inc. d/b/a Aexgroup (AEX) and Ruiz v. Affinity Logistics Corporation (ALC).

In Sherman, former delivery drivers allegedly improperly classified as “independent contractors” brought civil suit against AEX, a courier company. AEX contracted with drivers in order to make scheduled deliveries. AEX required that each driver execute a written agreement, which classified them as an independent contractor. Despite the contract language; however, AEX required each driver to adhere to strict business policies and practices. AEX dictated the precise route the driver had to travel on deliveries, and any change of routes had to be pre-approved by AEX. Drivers were required to wear uniforms that had AEX logos; any deviation from this policy could result in fines or payment reduction.

The Sherman court, applying Pennsylvania law, noted that, in determining whether a relationship is one of employee-employer or independent contractor, certain factors will be considered which, while not controlling, serve as general guidance. These factors include: the control of the manner that work is to be done; responsibility for result only; terms of agreement between the parties; the nature of the work or occupation; the skill required for performance; whether one employed is engaged in a distinct occupation or business; which party supplies the tools; whether payment is by the time or by the job; whether the work is part of the regular business of the employer; and the right to terminate the employment at any time.
The Court, applying this multi-factor test, concluded that the drivers were “employees” of AEX, rather than independent contractors.

In stark contrast, Ruiz went the other direction. There, former furniture delivery drivers brought suit against ALC alleging that they were misclassified and, therefore, would be entitled to various benefits afforded under California law. The drivers who operated on behalf of ALC made home deliveries to customers of large retailers who purchased various types of home furnishings. Drivers were required to execute a contract, which classified each driver as an independent contractor of ALC. ALC leased all delivery trucks before subleasing them to the drivers. Drivers were allowed to accomplish deliveries themselves; however, this was not a requirement. Drivers were allowed to hire other drivers to complete such deliveries. ALC did not directly control the number of hours the driver worked: instead, the length of each day depended on how quickly and efficiently the drivers completed their routes.

The Ruiz court noted that under California law, the label which the parties place on their relationship “is not dispositive and will be ignored if their actual conduct establishes a different relationship.”

The court noted the primary factor is the “right to control” the manner and means of performance. Secondary factors include: right to terminate at will; distinct business occupation or business; work under principal’s direction or by specialist without supervision; skill required; who provides the instrumentalities, tools, place of work; length of time for performance of services; method of payment; work part of principle’s regular business; parties’ belief; opportunity for profit or loss; and investment in equipment or materials.

The Ruiz court ultimately determined that the drivers were not employees of ALC, but were independent contractors. While ALC did exercise some control over the drivers, such control was either unrelated to the manner and means by which the drivers accomplished their work, but was instead related to external regulation or customer preference. The Ruiz Court acknowledged, that while some of the factors favored a finding that the drivers were employees, taken together, the factors illustrated that the drivers were indeed independent contractors. It appeared that the court focused on the fact that ALC did not specifically dictate the driver routes and allowed the drivers to hire others to complete their scheduled deliveries. Such lack of control of ALC over the drivers was enough to establish an independent contractor relationship.

Common to both cases was the fact that both employers required the transportation workers to execute a formal written agreement, which classified them as independent contractors, as opposed to actual employees. Despite such contractual language, the end result of each case was very different. The fact is the contractual language between the parties is merely one factor to be considered when making a final determination as to the party’s relationship. Courts look far beyond what is stated in a contract and instead engage in a comprehensive analysis of the actual facts of the case. This approach can create inconsistent decisions; one fact pattern can be decided in favor of the employer in one courtroom, and that same fact pattern can be decided in favor of the worker in another.

12 *Ruiz* at *3.

13 *Ruiz* at *4-14.
An emerging trend, however, shifts the handling of the issue from the courtroom to the state assembly. The reasoning is both economic and practical. Legislation can create a bright line rule, by identifying distinct guidelines that must be met in order for a worker to be classified as an independent contractor. This, in turn, can reduce perceived employer abuse of classification, through definitive penalties for determined violations. The practical effect helps to level the playing field between all employers, making them play by the same rules in classifying workers. Further, the legislation is perceived to help to protect workers and to contribute to the economic growth and prosperity of society by preventing improper tax avoidance by employers.

A good example of a recent legislative action enacted to prevent perceived worker misclassification is Pennsylvania’s Construction Workplace Misclassification Act (CWMA). This law, enacted in February 2011, was prompted by backlash against the construction industry. The CWMA provides narrow guidelines which must be met before an individual who performs construction work can be considered an independent contractor. The immediate effect of the CWMA requires that workers who were previously classified as independent contractors must be reclassified as employees in order to comply with the CWMA. CWMA provides significant monetary and non-monetary consequences for misclassifying an individual as an independent contractor. The economic implication of violations are significant as each misclassified worker is considered a separate offense. In addition, violations of the CWMA can lead to a cease-work order, requiring the cessation of work by misclassified individuals within 24 hours, individual liability, as well as criminal sanctions.

Since CWMA went into effect in 2011, it has been effective. In the first year, the Pennsylvania Bureau of Labor Law Compliance received and investigated 29 complaints involving 106 different types of allegation.

In July 2012, the Pennsylvania legislature attempted a further “crackdown” on employee misclassification by introducing House Bill No. 2540, which, for the first time in Pennsylvania, specifically targets the “transportation” industry. To date, the bill has not been voted on, but was referred to the Committee on Labor and Industry however.

House Bill No. 2540, entitled “The Commercial Carrier Industry Workplace Misclassification Act” (CCMA), provides restrictive guidelines, which must be met before a worker operating in the transportation industry can be considered an independent contractor. The proposed bill broadly affects any employer in Pennsylvania who deals with passengers or property “through, over, above, or under land, water or air.” The heart of the proposed bill states that an individual is an independent contractor only if 1) the person has a written contract to perform such service; 2) the person is free from control or direction both under the contract and in fact; and 3) the person providing the service is customarily engaged in an independently established trade, occupation, profession or business. Factors like the failure to withhold Federal or State income taxes or pay unemployment compensation premiums are expressly not to be considered.

14 43 P.S. §§933.1 – 933.17.
Like the CWMA, the CCMA provides for significant civil penalties, as well as criminal penalties for intentional violations of the act. The similarities between the two laws illustrate the legislature’s confidence in the application and benefits derived of legislation as opposed to leaving the issue of worker misclassification up to the judiciary.

In conclusion, transportation employers operating business in Pennsylvania need to strongly consider their current employee relations policies, and, if necessary, begin to make appropriate changes in order to ensure future compliance with applicable worker classification legislation. Making sure all independent contractors be incorporated and provide up-to-date certificates of insurance would help immensely in the short term. Further, if not previously utilized, employers should document all employment relationships via written agreement, which specifically defines the terms of the relationship. Likewise, employers should have written job descriptions for each position offered. Employers should further institute a review policy that periodically ensures the written job descriptions coincide with the actual duties performed by the worker engaged in each position. Such progressive actions will help attain compliance with worker classification legislation. Such compliance will not only benefit the employer, by avoidance of harsh civil and criminal penalties, but also provide applicable protection to workers afforded by proper classification.
THE D.C. CIRCUIT’S DECISION VACATING
THE CLASS CERTIFICATION IN THE RAIL FREIGHT
FUEL SURCHARGE ANTITRUST LITIGATION

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The Rail Freight Fuel Surcharge Antitrust Litigation consolidates in the federal district court in Washington, D.C., antitrust treble damage actions alleging that the four Defendant railroads (BNSF, CSX, Norfolk Southern, and Union Pacific) conspired to fix prices by coordinating their fuel surcharge programs in order to impose supra-competitive total price increases on rail shippers. After evidentiary proceedings under Fed. R. Civ. P. 23, Judge Paul L. Friedman issued a certification for a Plaintiff class. In re Rail Freight Fuel Surcharge Antitrust Litig., 287 F.R.D. 1 (D.D.C. June 1, 2012). On August 9, 2013, a unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit vacated the certification and remanded it for reconsideration. In re Rail Freight Fuel Surcharge Antitrust Litigation, D.C. Cir. No. 12-7085, 2013 U.S. App. LEXIS 16500. The court of appeals directed Judge Friedman to reconsider the certification in light of a decision of the Supreme Court announced while the railroads’ appeal of the certification was pending: Comcast v. Behrend, 133 S. Ct. 142, No. 11-864, decided March 27, 2013. This article reviews the litigation and the decision of the court of appeals.

I. THE VACATED CLASS CERTIFICATION

The certified class consisted of all entities or persons that between July 1, 2003 and December 31, 2008 directly purchased rate-unregulated rail freight transportation services from the defendant railroads “as to which Defendants assessed a stand-alone rail freight fuel surcharge applied as a percentage of the base rate for the freight transport (or where some or all of the fuel surcharge was included in the base rate through a method referred to as “rebasing.”)” Expressly excluded from the class were shippers that paid a fuel surcharge under a contract that “(i) was entered before July 1, 2003, and (ii) provided for a stand-alone Fuel Surcharge to be paid under a predetermined formula specifically set forth in the contract.”

II. THE CONFLICTING MODELS FOR PROVING CLASS-WIDE ANTITRUST DAMAGES

In the proceedings leading to the class certification, the plaintiffs and the defendant railroads presented conflicting expert testimony as to whether the issues of antitrust liability and treble damages were susceptible of proof under Rule 23’s criteria for certifying class actions. The plaintiffs relied on regression models prepared by Dr. Gordon Rausser of the University of California at Berkley. The railroads attacked that model with the testimony of Dr. Robert Willig of Princeton University. Both experts are distinguished professors of economics. To resolve this conflict between experts, Judge Friedman relied on cases from the Third Circuit generally holding that, in order to
determine which expert is correct about whether the injury-in-fact question is common to the class, two questions must be answered: (1) whether the plaintiffs have established that their expert's theory of common impact is "plausible"; and, if so, (2) whether the plaintiffs have established by a preponderance of the evidence that the expert's plausible theory is "susceptible to proof at trial through available evidence common to the class." Behrend v. Comcast Corp., 655 F.3d 182, 199 (3d Cir. 2011) ("Comcast"), which confirmed the reasoning of In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008). Judge Friedman, who also relied on similar cases from other circuits, invoked Comcast some 18 times in the course of his opinion.

III. THE RAILROADS’ INTERLOCUTORY APPEAL OF THE CLASS ACTION CERTIFICATION

On July 5, 2012 the railroad defendants petitioned the D.C. Circuit under Fed. R. Civ. P. 23(f) for permission to appeal Judge Friedman’s certification of the direct purchaser class. D.C. Cir. Docket No. 12-8008. The rule commits permission for such an interlocutory appeal to a certiorari-like discretion of the courts of appeals. The D.C. Circuit, like other circuits, has developed guiding criteria.

The D.C. Circuit postponed decision on the leave-to-appeal issue by referring it to the merits panel. Under prevailing D.C. Circuit precedent, “interlocutory review of class certification decisions pursuant to Rule 23(f) is ordinarily appropriate in three circumstances: 1) when a ‘questionable’ class certification decision creates a ‘death-knell situation’ for either party; 2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions...that is likely to evade end-of-the-case review”; and 3) when the certification decision is manifestly erroneous... Even if a case falls into none of these categories, [the court] will grant 23(f) interlocutory review in ‘special circumstances,’ though [the court has] cautioned that such review should be ‘granted rarely.’” In re Veneman, 369 F.3d 789, 794 (D.C. Cir. 2002), (summarizing standards announced by In re Lorazepam & Clorazepate Antitrust Litigation, 289 F. 3d 98 (D.C. Cir. 2002)).

IV. THE GRANT OF CERTIORARI IN COMCAST AFTER THE CERTIFICATION WAS APPEALED

On June 25, 2012, four days after Judge Friedman entered his opinion, the Supreme Court granted certiorari to review the Third Circuit’s Comcast decision. The order granting the writ directed the parties to address a single question that the Court itself had formulated. In effect, the question was whether expert testimony to show that a case is susceptible proof of antitrust damages on a class action basis must meet the requirements for the admission of expert evidence set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

In the meantime, briefing of the defendant railroads’ interlocutory appeal of Judge Friedman’s class action certification appeal continued over the summer of 2012. Among other challenges to Judge Friedman’s decision, the defendant railroads’ opening and reply briefs asserted that the model used by the class Plaintiffs’ expert to demonstrate that damages could be proved by common evidence included shipments made under contracts entered before July 1, 2003, the date when, according to class plaintiffs’ expert, the conspiracy began. The inclusion of such shipments, the defendant railroads contended,
rendered class plaintiffs’ model fatally defective because it attributed substantial damages to lawful, “legacy” contracts pre-dating the conspiracy.

The class plaintiffs responded in two ways. First, they argued that subsequent documents and depositions showed that the conspiracy was beginning to take shape before the class period, i.e. in early 2003. Second, while conceding “that a damages model generally may not aggregate injuries resulting from lawful and unlawful conduct,” the class plaintiffs argued that no case holds “that a damages model must be discarded because it calculates overcharges for a narrow subset of transactions outside a class definition.” After the parties’ briefs were filed, the court scheduled oral argument for May 3, 2013 before Chief Judge Garland and Judges Brown and Sentelle.

In the meantime, on March 27, 2013, the Supreme Court issued its decision in Comcast, Inc. v. Behrend. The 5-member majority did not answer the question propounded in the Court’s order granting review in Comcast, i.e., whether experts testifying on the certification of a class action must qualify under Daubert in order to render their testimony admissible. Instead, the majority addressed Comcast’s argument on the merits. It ruled that the Comcast Plaintiffs’ model for showing class-wide damages was fatally deficient because it rested on one of three theories of antitrust impact that the district court had rejected, and not on the theory that the district court had actually adopted for certification purposes. The majority ruled that a “model purporting to serve as evidence of damages in this class action must measure only those damages attributable to the theory of impact” the district court had adopted:

If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3). Calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation. In other words, the model assumed the validity of all four theories of antitrust impact initially advanced by respondents. At the evidentiary hearing, [class plaintiff’s expert] expressly admitted that the model calculated damages resulting from “the alleged anticompetitive conduct as a whole” and did not attribute damages to any one particular theory of anticompetitive impact.

The Comcast majority singled out for particular disapproval the Third Circuit’s statement that “[a]t the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations.” The Comcast majority ruled that “such assurance is not provided by a methodology that identifies damages that are not the result of the wrong.” Judge Friedman’s opinion quotes this disapproved Third Circuit statement in support of his key finding: that the damage model proffered by the class plaintiffs satisfies the burden defined by the Third Circuit, and that a preponderance of the evidence shows “that plaintiffs will be able to measure damages on a class-wide basis using common proof.” 287 F.R.D. at 73.
V. THE ORAL ARGUMENT OF THE RAILROADS’ APPEAL FROM JUDGE FRIEDMAN’S CERTIFICATION

Some five weeks after the decision in Comcast was announced, on May 3, 2013, the defendant railroads’ appeal was argued before Chief Judge Garland, and Circuit Judges Brown and Sentelle. The defendant railroads’ advocate, Carter G. Phillips, advanced two theories for reversal of the class certification. First, he urged immediate reversal on the basis of Comcast. He contended that the damages model proffered by the class plaintiffs’ expert and adopted by Judge Friedman included contracts of “legacy shippers.” These contracts, he contended, pre-dated the conspiracy on which the model’s measure of class-wide antitrust impact and damages was based. Inclusion of the legacy shippers, Phillips argued, tainted the class Plaintiffs’ model with the same defect condemned by Comcast: “a methodology that identifies damages that are not the result of the wrong.” Comcast, slip op. at 10 Second, Phillips contended, the class plaintiffs’ model failed to account for a significant number of major shippers that had sufficient market leverage to impose on the railroads negotiated bottom line rates (i.e. total rates) that, regardless of the alleged fuel surcharge conspiracy, were in fact lower than previous rates. These powerful shippers, he asserted, could suffer no antitrust injury from the conspiracy. Over all, he asserted, only proof of individualized damages is possible, thus defeating Judge Friedman’s class certification.

The class plaintiffs’ counsel, Stephen R. Neuwirth, vigorously contested these assertions. Early in his argument, he was asked by Chief Judge Garland where in Judge Friedman’s opinion the railroads’ arguments were answered. He did not immediately provide such cites. Somewhat later, however, he began referring to specific findings of fact to the effect that any deviation from the standardized rates said to result from the alleged conspiracy were little more than isolated anomalies. He also cited depositions and discovery in the record that, he said, showed that the conspiracy was well under way when many of the legacy contracts were signed. His principal rebuttal, however, was that the defendant railroads were simply attempting to relitigate Judge Friedman’s findings of fact by characterizing them as legal error. He asserted that substantial evidence supported Judge Friedman’s detailed findings that the class plaintiffs’ model was more reliable than the railroads’ model, and that damages to the certified class could be proved by common evidence.

On the issue of whether the appeal should be allowed, the defendant railroads argued that the alleged inconsistency between Comcast and the certification opinion demonstrated manifest error, and that the threat of enormous liability to the class plaintiffs sounded a “death knell” for the defendant railroads, which would force them to settle. Judge Sentelle and Chief Judge Garland, who sat on the panels that previously defined the D.C. Circuit’s standards for interlocutory class action appeals, pointed out that such a use of the “death knell” standard would mean that the courts of appeals would have to allow most interlocutory appeals of certification orders, contrary to the intent of Rule 23(f). On the other hand, Judge Brown viewed the death knell standard as really addressed to “the inexorable pressure to settle even a bad case because of the level of liability.” Mr. Neuwirth tried to distinguish Comcast on the ground that the theory of damages in that case was based on a theory of liability that had been rejected by the trial court, while the damages model in this case is directly based on the theory of liability defined in the original 2007 complaint. He insisted that Judge Friedman’s findings of fact refuted the railroads’ claims of manifest legal error.
VI. THE D.C. CIRCUIT'S DECISION VACATING AND REMANDING THE CERTIFICATION

Judge Brown wrote the court’s unanimous 18-page opinion vacating the certification and remanding it to Judge Friedman for reconsideration. She first summarized the history of the alleged freight rail fuel surcharge conspiracy. Her opinion noted that the four defendant railroads account for 90% of rail freight traffic, and that the Surface Transportation Board in January 2007 had ruled that as applied to shipments it regulates, the surcharge was an unreasonable practice. (The STB’s ruling does not apply to shipments arranged under negotiated bi-lateral contracts, the category for which the plaintiffs sought class certification, because such contracts are statutorily excluded from the Board’s jurisdiction. 49 U.S.C. §10709(c)(1) (2006)).

The opinion then summarized the elements required for class certification under Fed. R. Civ. P. 23, and in particular, the requirement that “questions of law or fact common to class members predominate over any questions any questions affecting only individual members.” This requirement, which imposes on the plaintiffs the burden of showing, through common evidence, that class members have suffered injury in fact from the alleged antitrust conspiracy, became the focus of the conflict between the plaintiffs’ Dr. Rausser and the railroads’ Dr. Willig.

The court then addressed the threshold question: whether it should allow the railroads’ interlocutory appeal. Summarizing prior case law, it held that in this case a confluence of factors showed a hybrid rationale that falls into the category of “special circumstances” (slip op. 9):

Even if the amount involved does not sound a death knell for the defendants, it is still astronomical. Recent decisions of the Supreme Court have unsettled the law relating to class actions, and the latest pronouncement on the role of expert evidence [Comcast v. Behrend] was unavailable to the district court at the time of its decision. Collectively, these factors—the death knell, the questionability of class certification, and new developments in the jurisprudence—convince us that this is a case fit for immediate review.

A. The District Court’s Certification Was Questionable

The court found that “despite the defendants’ size and market position,” the magnitude of the treble-damage liability sought by the class plaintiffs “could threaten their financial stability.” Discounting Mr. Neuwirth’s reliance on the defendant’s financial reports, the court ruled that “[the death knell marks not the defendant’s demise, but the litigation’s.” (Slip op. 10, emphasis in original). Nevertheless, the court held that “a death knell alone does not warrant interlocutory review.” The challenged certification must not only lead inexorably to settlement, “but the certification decision itself must be ‘questionable.’” And that is precisely what the court determined after reviewing Dr. Rausser’s damages model. He had conceded that his model “measured overcharges to legacy shippers and class members alike.” Slip op. 13. The panel determined, moreover, that Rausser’s model failed to address the railroads concern that it gave false positives with respect to legacy shippers. That concern, the court concluded, had not been addressed by Judge Friedman’s opinion. Therefore, Rausser’s concession and Judge Friedman’s silence, when considered in the light of Comcast, rendered the certification
decision “questionable” under the D.C. Circuit’s standards governing interlocutory appeals of class certification orders.

B. The Certification Order Involved “Special Circumstances”

The court then concluded that the case fell within the “special circumstances” element of those standards. Comcast, it ruled, had “sharpen[ed] the defendants critique of the damages model as prone to false positives,” because it requires that district courts closely scrutinize the evidence supporting claims that common issues predominate, “even when doing so requires inquiry into the merits.” 133 S. Ct. at 1433. Judge Friedman, however, did not have the benefit of that intervening decision when he certified the class. The confluence of Comcast, “the pressure to settle posed by the threat to the defendants’ market capitalization, and the identified defect in [Rausser’s] damages model” justified allowing the railroads interlocutory appeal of the certification order. The court added a strong caveat, however, that such appeals continue to be disfavored. It emphasized, however, that “this is not the ordinary case.” Slip op. 14-15.

C. The Merits of the Appeal

The court quickly disposed of the merits of the appeal on the basis of the reasons it gave for allowing it, and particularly, its acceptance of the railroads’ contention that Dr. Rausser’s model has a propensity toward false positives. In barely three pages addressing the merits, it refuted the plaintiffs’ effort to save Dr. Rausser’s model.

It rejected plaintiffs’ contention that the pre-class contracts are irrelevant. It was their burden to submit a reliable model, and, in the court’s view, they did not do so. It observed “[a]s things stand, we have no way of knowing the overcharges the damages model calculates for class members is any more accurate than the obviously false estimates it produces for legacy shippers.” Slip op. 16.

The court also rejected plaintiffs contention that the price-fixing conspiracy pre-dated the class period. It found no evidence of this possibility, which, it said, might have been shown by running the models from the claimed earlier beginnings of alleged the conspiracy. In addition, it held this contention to be contrary to the district’s court’s finding that there was a great difference between the railroads’ fuel surcharges before and after the class period. Slip op. 16-17.

Finally, the court was not persuaded by plaintiffs’ effort to characterize the district court’s acceptance of Rausser’s models as findings of fact subject to appellate revision only for clear error. It concluded that there were no such findings because Judge Friedman “never grappled with the argument concerning legacy shippers.” Id.

D. The Court of Appeal’s Remedy

The court denied the railroads’ attempt to end the case once and for all by reversing the certification with directions to dismiss the complaint. Notwithstanding its finding that Rausser’s model was defective, the Court went out of its way to hold that Judge Friedman had reasonably relied on the pre-Comcast precedents he had cited. Those precedents include not only the very Third Circuit ruling that the Supreme Court reversed in Comcast, but also decisions from other circuits that, at the certification stage, viewed false positives and the inclusion of non-injured persons in the class as issues to be
resolved when the merits were tried. Since the district court did not have the benefit of Comcast, and it had failed to address the flaws in Rausser’s models, the court simply vacated the certification and remanded the case to the district court for reconsideration in light of Judge Brown’s opinion.

E. The Future of the Litigation

What happens next is in the plaintiffs’ hands. The D.C. Circuit’s unanimous decision will be difficult to undo either by a petition for rehearing to the panel or to the full en banc court of appeals. Because a majority of the Supreme Court has exhibited considerable hostility toward class actions in recent decisions, plaintiffs’ prospects for successfully petitioning for a writ of certiorari seem quite low. If plaintiffs choose to continue the litigation, they will face the railroads’ insistence that antitrust injury and damages in this case can be proved only on an individualized basis. In order to pursue class certification, therefore, they will have to revise their damages model in accordance with the court of appeals decision. If they choose that course, they can expect their model to be very closely scrutinized by Judge Friedman.
INTERNATIONAL SHIPMENTS AND THE ERODING APPLICATION OF THE CARMACK AMENDMENT

John E. Anderson, Sr. and Jonathan R. Patton

I. INTRODUCTION

In today’s global marketplace, it is not uncommon for products to be shipped across borders to reach consumers in every corner of the world. Inevitably, as products travel great distances via multiple forms of transportation, accidents sometimes occur in which the cargo is damaged or destroyed.

The Carmack Amendment provides a well-established legal regime to deal with such incidents that occur on interstate trucking shipments within the United States. When the accident occurs on the domestic portion of an international route, however, the applicability of the Carmack Amendment is still evolving. The purpose of this article is to examine the application of the Carmack Amendment to international shipments. First, it provides an introduction to the Carmack Amendment. Then, it discusses how the Carmack Amendment applies to international shipments and examines the Supreme Court’s recent decision in Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp. Finally, the article profiles three recent cases that all suggest a more limited application of the Carmack Amendment to transnational shipments after Kawasaki. This article does not address the applicability of the Carmack Amendment to transportation by a motor carrier in the United States solely between a place in a state and a place in another state.

II. THE CARMACK AMENDMENT

The Carmack Amendment was enacted in 1906 to govern bills of lading in the rail transportation industry. It has been altered and codified over the last century. In its current form, it provides a uniform national system of liability and damages for interstate rail and motor carriers designed to provide certainty to both shippers and carriers.

Carmack represents a codification of the common law rule imposing strict liability upon the common carrier without proof of negligence. Where applicable, Carmack imposes upon ‘receiving carriers’ and ‘delivering carriers’ liability for actual loss or injury to property caused during the motor or rail route under the bill of lading, regardless

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3 Id.

4 See 49 U.S.C. §§ 11706, 14706

of which carrier caused the damage.\textsuperscript{6} One purpose of Carmack is to relieve cargo owners of the burden of searching out a particular negligent carrier among the often numerous carriers handling an interstate shipment of goods.\textsuperscript{7}

\textbf{III. WHEN DOES THE CARMACK AMENDMENT APPLY TO INTERNATIONAL SHIPMENTS?}

One evolving issue is the applicability of the Carmack Amendment to portions of international shipments. By its terms, the Carmack Amendment applies to shipments between places in the United States, and between a place in the United States and a place in a foreign country to the extent the transportation is in the United States.\textsuperscript{8} Although this seems clear, what is not entirely clear is whether the Carmack Amendment applies to domestic segments of an international shipment that involves multiple different methods of transportation and one contract – often a through bill of lading – that covers all segments of the journey.

The United States Supreme Court dealt with this issue in the case of Kawasaki Kisen Kaisha Ltd. V. Regal-Beloit Corporation. In Kawasaki, the plaintiffs were cargo owners who contracted with the defendant to transport their cargo from China to inland destinations in the Midwestern United States.\textsuperscript{9} The defendant issued four through bills of lading that covered the entire course of the shipment, including the transport segments through the United States.\textsuperscript{10}

The through bill of lading included several provisions at issue in the case. First, they included a “Himalaya Clause,” which purported to extend the through bills’ limitations on liability to subcontracting carriers.\textsuperscript{11} Second, they allowed the defendant to subcontract on any terms whatsoever.\textsuperscript{12} Third, the bills provided that the Carriage of Goods by Sea Act (COGSA) applied to the entire journey, not just the sea portion.\textsuperscript{13} And finally, the bills included a forum-selection clause requiring that lawsuits relating to the carriage be brought in Japan.\textsuperscript{14}

The goods were shipped to a port in Long Beach, California where the containers were loaded onto a Union Pacific train.\textsuperscript{15} The cargo was destroyed when the train carrying the cargo derailed in Tyrone, Oklahoma.\textsuperscript{16} The plaintiffs filed suit in California, and they argued that the Carmack Amendment applied to the portion of the cargo’s journey in the inland United States and that it therefore trumped the forum-selection clause (and the other clauses) in the through bills of lading.\textsuperscript{17} The District Court for the Central District of California disagreed and dismissed the case.\textsuperscript{18} On appeal, however,
the Ninth Circuit agreed with the Plaintiffs and held that the Carmack Amendment applied to the inland portion of the journey.19

The issue was whether the terms of a through bill of lading issued abroad by an ocean carrier can apply to the domestic part of the import’s journey by a rail carrier and supersede the Carmack Amendment. The Supreme Court held that Carmack does not apply to the domestic segments of a shipment originating overseas under a single through bill of lading.20

Justice Kennedy, writing for the majority, reasoned that since Carmack only applies to carriers required by the statute to issue a Carmack-complaint bill of lading, and since only “receiving carriers” are required to issue such a bill of lading, in order for Carmack to apply to a carrier, that carrier must be a “receiving carrier” under the statute.21 He explained that a receiving carrier for purposes of the Carmack Amendment was only the initial carrier that “received” the property “at the journey’s point of origin.”22 He then concluded that since the defendant received the cargo at an overseas location under a through bill of lading that covered transport into an inland location in the United States, the journey did not include a receiving rail carrier that had to issue bills of lading under Carmack, and, consequently, Carmack did not apply.23

Thus, the Supreme Court’s decision in Kawasaki limited Carmack’s application in international shipments. However, it left open several issues such as whether Carmack applies to situations where goods are received in the United States for export, and whether it applies in situations involving a freight forwarder or other intermediaries.

These questions and the application of the Carmack Amendment after Kawasaki are making their way through the lower courts. Three recent opinions demonstrate that courts seem to be using Kawasaki to carve out even more instances where carriers can avoid Carmack liability.

IV. RECENT CASES

Three recent cases highlight the eroding application of the Carmack Amendment after Kawasaki.

In Norfolk Southern Railway v. Sun Chemical Corp., the plaintiff, Sun Chemical Corporation (“Sun”), hired an ocean carrier to transport two containers of ink manufactured by Sun from Kentucky to Brazil.24 After the ocean carrier hired a freight forwarding company to arrange the shipment, the freight forwarder hired the defendant, Norfolk Southern Railway Company (“Norfolk”), to carry the ink by rail from Kentucky to Savannah, Georgia, where it would begin its ocean voyage to Brazil.25 The rail cars carrying the containers derailed and the ink was destroyed.26 Sun and its insurer sued Norfolk for negligence and breach of contract.27 Sun moved for summary judgment on

19 Id.
20 Id. at 2442.
21 Id. at 244-46.
22 Id. at 2443.
23 Id. at 2444, 2449.
25 Id.
26 Id.
27 Id.
several theories, including the theory that Norfolk was strictly liable for the loss under the Carmack Amendment. The trial court granted the Motion for Summary Judgment and held that Norfolk Southern was subject to the Carmack Amendment.

Sun had entered into a contract with the ocean carrier under a “through bill of lading,” a bill in which cargo owners can contract for transportation across oceans and to inland destinations in a single transaction. The ocean carrier thus took responsibility for the entire transportation of the shipment from the place of receipt to the place of the final destination, and it retained the right to use the services of other carriers and modes of transportation. Sun also authorized the ocean carrier to subcontract on any terms for the handling and carriage of the goods.

Under this authority, the ocean carrier contracted with a freight forwarding company for inland transportation, which in turn hired Norfolk to transport Sun’s ink from Kentucky to Savannah. The transportation agreement between the freight forwarding company and Norfolk incorporated Norfolk’s rules circular governing such transport, which offered customers a choice between “standard” and “Carmack” liability provisions. The rules circular stated in bold face capitals that unless language expressly selecting “Carmack” was included in the original shipping instructions, any tender of freight for transportation would be accepted under standard liability coverage provided and not under Carmack coverage.

The primary question before the Georgia Court of Appeals was whether Sun could be bound by the agreement of the freight forwarder and Norfolk, reached without notice to Sun, such that Norfolk could not be held strictly liable under the Carmack agreement. The Court held that Norfolk was not subject to Carmack liability for several reasons: first, the bill of lading issued by the ocean carrier was a “maritime contract” to which Carmack liability does not apply; second, Norfolk was not the “receiving carrier” of the ink containers for purposes of Carmack liability; and third, Sun authorized downstream carriers to reach their own terms as to liability, which the freight forwarder did but then declined Norfolk Southern’s offer of Carmack liability. The court of appeals, therefore, held that Norfolk was not subject to the Carmack Amendment.

In *Royal & Sun Alliance Insurance, PLC v. Service Transfer, Inc.* the parties disputed whether the domestic leg of an international transportation contract was governed by the United States Carriage of Goods by Sea Act (“COGSA”) or the Carmack Amendment.

The defendant was an interstate motor carrier that provided service to ocean carrier American President Lines, Ltd. (“APL”). In April 2011, Biolife Plasma Services, LLC delivered a shipment of frozen human plasma to the defendant at a warehouse in

28 Id.
29 Id.
30 Id.
31 Id.
32 Id. at 22.
33 Id.
34 Id.
35 Id.
36 See id.
37 Id. at 27.
39 Id.
Kentucky. It was intended that the defendant would transport and deliver the plasma from Kentucky to APL in Norfolk, Virginia for further shipment by sea to Bremerhaven, Germany en route to its ultimate destination in Vienna, Austria. Biolife is part of Baxter and the plasma was to be delivered to a European affiliate of Baxter. While driving between Kentucky and Virginia, the defendant’s truck driver fell asleep and drove the truck off the road. The truck burned and the shipment was lost. Royal and Sun Alliance (“Royal”) commenced the action as subrogee of Baxter.

The shipment of plasma was subject to a sea waybill between Baxter and APL. The waybill provided for the through intermodal transport of the goods from Kentucky to Vienna, Austria. The waybill included a Clause Paramount and a Himalaya Clause. The clauses, in relevant part, extended APL’s liability under COGSA to the period prior to loading goods onto APL’s ocean vessel and permitted APL’s subcontractors to invoke COGSA liability limitations, respectfully.

When the defendant’s truck driver picked up the shipment from Kentucky on April 11, 2011, the defendant driver signed a straight bill of lading dated April 9, 2011. The bill of lading stated that the subject shipment was from MDI in Kentucky to Baxter AG in Vienna, Austria.

In its discussion, the court noted that COGSA governed the terms of bills of lading issued by ocean carriers engaged in foreign trade. Further, COGSA allowed parties the option of extending certain COGSA terms by contract to cover the entire period to which the goods would be under a carrier’s responsibility, including a period of inland transport. The Carmack Amendment, by contrast, governed the terms of bills of lading issued by domestic motor carriers providing transportation or service subject to the jurisdiction of the Surface Transportation Board.

The court held that the clear terms of the waybill stated that COGSA governed this action. The ocean freight services agreement between Baxter and APL provided that liability for any freight claims shall be determined pursuant to the terms and conditions of the waybill. The waybill specified that APL was responsible for the performance of the carriage from the place of receipt to the place of delivery of the combined carriage indicated on the waybill, namely the shipment of goods from Erlanger, Kentucky to Vienna, Austria via the ports of Norfolk, Virginia and Bremerhaven, Germany. Also, it contained a Clause Paramount that specifically extended COGSA’s application to the inland portion of the shipment. The Himalaya Clause extended COGSA’s application

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40 Id. at *1-2.  
41 Id. at *2.  
42 Id.  
43 Id.  
44 Id.  
45 Id.  
46 Id. at *3.  
47 Id.  
48 Id.  
49 Id. at *4.  
50 Id.  
51 Id. at *5.  
52 Id.  
53 Id. at *6.  
54 Id. at *7.  
55 Id.  
56 Id. at *7-8.  
57 Id. at *8.
to STI as APL’s subcontractor on the waybill.\textsuperscript{58} STI did not issue its own bill of lading and thus it had no privity with Baxter.\textsuperscript{59} In fact, no bill of lading was issued by any party to cover solely the domestic segment of the international shipment.\textsuperscript{60} Thus, the Court reasoned that claims arising during STI’s transport of the goods from the waybills place of receipt, Erlanger, Kentucky to the port of loading, Norfolk, Virginia, were covered by COGSA.\textsuperscript{61}

The court noted that the Carmack Amendment by its terms did not apply to non-receiving carriers transporting goods as part of a shipment between the United States and a non-adjacent foreign country under a through bill of lading.\textsuperscript{62} It therefore concluded that COGSA governed the claims at issue in the action and not the Carmack Amendment.\textsuperscript{63}

Finally, \textit{Hartford Fire Insurance Co. v. Expeditors International of Washington, Inc.} involved the loss of solar panels while in transit from the United States to France.\textsuperscript{64} Hartford brought the suit as subrogee of Evergreen Solar, Inc. (“Evergreen”).\textsuperscript{65} Expeditors International of Washington (“Expeditors”) hired Intransit to transport an empty ocean container to Evergreen in Devens, Massachusetts, and, after having the container loaded by Evergreen, to deliver it to a terminal in Elizabeth, New Jersey.\textsuperscript{66} Evergreen loaded the container and sealed it with a seal.\textsuperscript{67} On June 29, 2009, Intransit issued a “pick-up/delivery receipt” listing Intransit’s “client” as Expeditors and the entity that delivered the container as Evergreen.\textsuperscript{68}

On July 2, 2009, Intransit’s driver delivered the container with the seal intact.\textsuperscript{69} Intransit claimed that Evergreen sealed the container, at no time during Intransit’s transport was the container open and visible for inspection, and that Intransit had no knowledge of how the container was loaded and secured.\textsuperscript{70}

Expeditors issued a bill of lading on July 6, 2009, listing Evergreen as the shipper and Soleil Energie SAS (“Soleil”) as the consignee.\textsuperscript{71} The bill of lading listed the place of Evergreen’s receipt as Devens, the port of loading as New York, New York and the place of delivery as Soleil as Fos-Sur-Mer, France.\textsuperscript{72} The bill of lading contained a choice of law provision stating that COGSA applied.\textsuperscript{73}

The bill of lading contained three other provisions relevant to the case. First, it contained a limitation of liability provision.\textsuperscript{74} Second, the bill of lading also limited liability “where the state of carriage during the loss of or damage to the goods cannot be

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at *8-9.
\textsuperscript{63} Id. at *15.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at *2.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at *2-4.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at *5.
\textsuperscript{74} Id.
provided” – in that instance, “it will be presumed that the loss or damage occurred during that portion which is considered sea carriage under this bill.” 75 Third, the bill of lading contained a sub-contracting provision, which provided that the carrier could subcontract on any terms, but that Evergreen was to indemnify the carrier against any claims made against it by any of its sub-contractors. 76

The parties disputed whether COGSA or the Carmack Amendment applied to the action. Intransit argued that COGSA, not the Carmack Amendment, applied to the shipment at issue because Carmack “does not apply to cargo moving under a through bill of lading to or from a non-adjacent country.” 77 The court agreed and noted that the bottom line in determining Carmack’s applicability is whether the carrier functioned as a receiving rail carrier. 78

The court noted that the facts regarding Intransit’s role were undisputed. Expeditors contracted with Evergreen for the through movement from the U.S. to France. 79 It was undisputed that Expeditors was the freight forwarder for the transport at issue. 80 It was further undisputed that Intransit transported the container to Evergreen in Massachusetts and then delivered the container after it was loaded by Evergreen to the terminal in Elizabeth, New Jersey. 81 In other words, Expeditors only contracted a small portion of the move to Intransit, and instructed and permitted Intransit to pick up the cargo from the consignee in Massachusetts pursuant to Expeditors’ bill of lading and shipping receipt. 82 So Intransit was an intermediate carrier for the freight forwarder. 83

On those facts, the court decided that Expeditors, not Intransit, was the receiving carrier. 84 Because Carmack did not apply to the mere delivery carriers, the court reasoned that it did not apply to Intransit. 85

The court also noted that there were two additional reasons why Carmack did not apply in this instance. First, the plaintiff sued based upon the bill of lading issued by Expeditors and thus was bound by its terms. 86 The bill of lading clearly stated that COGSA applied to Expeditors and its subcontractors. Second, where a bill of lading required a substantial carriage of goods by sea, its purpose was to effectuate maritime commerce, and thus it was a maritime contract. 87 For all of those reasons, the Court found that COGSA, not the Carmack Amendment, applied.

These three cases all demonstrate the eroding applicability of the Carmack Amendment to the domestic portions of international shipments. They suggest that after Kawasaki courts are more likely to conclude that other bodies of law or contractual arrangements apply to those situations.

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75 Id. at *6.
76 Id.
77 Id. at *11.
78 Id. at *15-16.
79 Id. at *16.
80 Id. at *17.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id.
86 Id.
87 Id. at *18.
V. CONCLUSION

International shipments have become more commonplace as products are increasingly transported across the world. The application of the Carmack Amendment to these shipments has become somewhat complicated due to the number of entities involved and the complexity of the agreements between them.

The Supreme Court’s decision in *Kawasaki* and several recent cases in its wake indicate a more limited application of Carmack to the domestic segments of international shipments. This trend is significant because it provides motor carriers and railway companies with strategies for attempting to avoid Carmack liability both at the contracting stage and in litigation.
PUT THE PHONE DOWN: AT THE END OF THE DAY WHAT DO THE NEW RULES ON TEXTING AND CELL PHONE USE MEAN TO YOU?

Maureen E. Maney, Esq. and William H. Major, III, Esq.¹

On January 3, 2012, the Federal Motor Carrier Safety Administration (“FMCSA”) instituted a rule restricting the use of hand-held cell phones by commercial motor vehicle (“CMV”) drivers during operation of CMVs. The new rule prohibits a CMV driver from holding a cell phone to make a call; from texting, calling, browsing the Internet or using any other application that requires pressing more than a single button; and from reaching for a cell phone in such a way that the CMV driver is no longer seated and restrained by a seat belt.

RATIONALE

According to the National Highway Traffic Safety Administration, motor vehicle accidents caused by distracted driving resulted in the deaths of 5,474 people in 2009 on U.S. roadways, accounting for 16% of all traffic fatalities that year.² In 2011, while the number of people killed in motor vehicle accidents involving a distracted driver dropped to 3,331, some 387,000 people were injured in such accidents.³

A driver distraction is defined as “the voluntary or involuntary diversion of attention from primary driving tasks due to an object, event, or person.”⁴ Driver distractions can be classified into four categories:⁵ (1) a visual distraction involves a driver taking his or her eyes off the road;⁶ (2) a manual distraction involves a driver taking his or her hands off the motor vehicle’s steering wheel;⁷ (3) a cognitive distraction involves the driver driving while thinking about something other than the road and driving conditions;⁸ and, (4) an auditory distraction involves a driver listening to the radio or other music or to someone else talking.⁹

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⁶ “Final Rule”, supra note 4, at 75471.

⁷ Id.

⁸ Id.

⁹ Id.
A driver’s use of a hand-held cell phone may pose a higher safety risk than an activity such as eating or drinking while driving because it can involve all four categories of driver distraction simultaneously.\(^\text{10}\) For example, when a driver reaches for, dials, or otherwise uses a handheld cell phone, the driver is manually distracted, and each act requires visual distraction to complete.\(^\text{11}\) Focus on a conversation involves cognitive distraction, and participation in a conversation involves auditory distraction.

Research shows that drivers take their eyes off the road for an average of 3.8 seconds when they dial a handheld cell phone and for an average of 4.6 seconds when they text.\(^\text{12}\) At a driving speed of 55 miles per hour, these times equate to a driver traveling greater than the length of a football field without watching the road or holding the steering wheel with two hands.\(^\text{13}\) The clear conclusion is that a driver who texts or uses a handheld cell phone is less likely to safely operate a motor vehicle.

In fact, CMV drivers who dial a cell phone while driving are almost six times more likely to be involved in a safety-critical event than those who do not.\(^\text{14}\) CMV drivers who reach for a cell phone while driving are three times more likely to be involved in a safety-critical event.\(^\text{15}\) Further, the odds of being involved in a safety-critical event increase by more than 23 times for a driver who is texting or typing on a cell phone.\(^\text{16}\) Safety-critical events include motor vehicle accidents, near accidents, crash-relevant conflicts, hard braking in response to another vehicle, or unintentional lane changes.\(^\text{17}\)

Some suggest that simply talking on a cell phone without the use of hands while driving, without reaching or dialing, does not appear to pose as significant a risk. One study found that “talking or listening to a hands-free phone” and “talking or listening to a hand-held phone” are low risk activities.\(^\text{18}\) Based on such findings, the FMCSA has attempted to limit the new rule to restricting the higher risk activities, such as reaching for and dialing a cell phone while driving.

Many states have already taken steps toward minimizing the risk of using a cell phone while driving. As of October 1, 2013, 19 states and the District of Columbia will have prohibited all use of cell phones while driving a school bus.\(^\text{19}\) Meanwhile, eleven states and the District of Columbia prohibit all use of handheld cell phones while driving, regardless of whether the driver is operating a CMV.\(^\text{20}\) And, as of October 1, 2013, 23

\(^{10}\text{Id.}\)

\(^{11}\text{Id.}\)


\(^{13}\text{“Facts & Statistics: Distracted Driving”, supra note 3.}\)

\(^{14}\text{“Final Rule”, supra note 4, at 75472.}\)

\(^{15}\text{Id.}\)


\(^{17}\text{Hickman, Hanowski, & Bocanegra, supra, note 12, at 7, 23.}\)

\(^{18}\text{Olson, Hanowski, & Hickman, supra, note 16, at 148.}\)

\(^{19}\text{“Cellphone and texting laws,” Insurance Institute for Highway Safety (July 2013), http://www.iihs.org/laws/cellphonelaws.aspx (Two more states ban all hand-held cellphone use by school bus drivers).}\)

\(^{20}\text{Id.}\)
states and the District of Columbia will have prohibited all drivers from texting while driving.\textsuperscript{21}

Since CMV drivers are held to a higher standard than the average motor vehicle driver, the FMCSA decided that a restriction on cell phone usage was needed.

**THE RULE**

**Definitions**

The Code of Federal Regulations and the FMCSA provide definitions of relevant terms in the rule such as “CMV,” ‘CDL program,” “driving,” “mobile telephone,” “texting,” and “use a handheld mobile telephone.” These definitions aim to ensure that the rule is clearly and correctly enforced, interpreted and followed.

**CMV**

A CMV is defined as “a self-propelled or towed vehicle used on the highways to transport persons or property in interstate commerce; and that either: (1) has a gross vehicle weight/gross vehicle weight rating of 10,001 pounds or greater; (2) is designed or used to transport more than 8 passengers (including the driver) for compensation; (3) is designed or used to transport more than 15 passengers, not for compensation; or (4) is transporting any quantity of hazardous materials requiring placards to be displayed on the vehicle.”\textsuperscript{22}

All CMV drivers are subject to FMCSA rules, including the cell phone restriction, with the exception of those employed by federal, state, or local governments.\textsuperscript{23} Additionally, while school bus operations and small passenger-carrying CMVs are usually exempted from FMCSA rules,\textsuperscript{24} this particular FMCSA restriction applies both to school bus operations and to small passenger-carrying CMVs that transport between 9 and 15 passengers, including the driver, without direct compensation.\textsuperscript{25}

**CDL Program**

The Commercial Driver’s License (“CDL”) program is a licensing program for drivers who operate certain large CMVs.\textsuperscript{26} A CMV qualifies for the CDL program if it “(1) has a gross vehicle weight/gross vehicle weight rating of 26,001 pounds or greater; (2) is designed to transport 16 or more passengers including the driver; or (3) is used to transport certain quantities of “hazardous materials.”\textsuperscript{27} If the CMV qualifies, a CDL is required if the CMV operates (transports persons or property) in interstate commerce or if its operation affects interstate commerce.\textsuperscript{28}

\textsuperscript{21} Id.\textsuperscript{22} “Final Rule”, supra note 4, at 75473.\textsuperscript{23} Id.\textsuperscript{24} Id.\textsuperscript{25} Id. at 75473, 75482.\textsuperscript{26} Id. at 75473.\textsuperscript{27} Id. at 75473.\textsuperscript{28} Id.
Driving

Driving for purposes of this rule means operating a CMV "on a highway, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays." In other words, if a CMV is stopped at a red traffic light or stuck in a bumper-to-bumper traffic jam, the rule continues to apply. The term "driving" does not, however, include the situation where "the driver has moved the [CMV] to the side of, or off, a highway and has halted in a location where the vehicle can safely remain stationary."

Mobile Telephones

The rule modifies the Code of Federal Regulations ("CFR") to comply with the new FMCSA policies. For instance, 49 CFR §§ 383.5 and 390.5 now include the definition of "mobile telephone." The sections define "mobile telephone" as "a mobile communication device that falls under or uses any commercial mobile radio service." Commercial mobile radio services include satellite telephone services and broadband radio services.

Use a Handheld Mobile Telephone

"Use a handheld mobile telephone" means "using at least one hand to hold a mobile phone to conduct a voice communication" or "dialing or answering a mobile phone by pressing more than a single button". Additionally, the term includes "reaching for a mobile phone in a manner that requires a driver to maneuver so that he or she is no longer in a seated driving position, restrained by a seat belt."

Texting

Texting is defined as "manually entering alphanumeric text into, or reading text from, an electronic device" including "short message service, emailing, instant messaging, a command or request to access a World Wide Web page, pressing more than a single button to initiate or terminate a voice communication using a mobile telephone, or engaging in any other form of electronic text retrieval or entry, for present or future communication."

Texting is not defined as including the use of a GPS or navigation system or "a device capable of performing multiple functions . . . for a purpose that is not otherwise prohibited." Under this definition, the use of fleet management systems, dispatching devices, smart phones, citizens band radios or music players is allowed as long as the driver is using the device in a way that has not been otherwise forbidden.
Texting also does not include a CMV driver’s “[p]ressing a single button to initiate or terminate a voice communication using a mobile telephone.” 39 In other words, pressing a single button to answer or hang up a phone call is not considered texting, which allows the definition of texting to coincide with the restrictions on handheld cell phone use.

The Restrictions

The FMCSA rule states that “no driver shall use a handheld mobile telephone while driving a CMV.” 40 Under the new rule, a CMV driver is now prohibited from using one hand to hold a cell phone and make a phone call while driving. 41 Furthermore, a CMV driver cannot dial, answer, or use a cell phone in any manner while driving if it takes more than pressing button to do so. 42 As a result, this rule prohibits texting that involves “pressing more than a single button,” which includes manually entering text or reading text from a cell phone. The texting restriction also prohibits using the Internet or other applications, as well as opening, reading, or writing an email.

The rule also prohibits a CMV driver from “reaching for a mobile phone in an unacceptable or unsafe manner”, which includes reaching for a cell phone on the passenger seat, under the driver’s seat, or into the sleeper berth. 43 A CMV driver cannot reach for a cell phone if that action requires moving from the seated driving position or unfastening the seat belt. 44 A CMV driver who wants to use a cell phone while driving must have a “compliant mobile telephone” in close proximity. 45

Finally, this rule applies not only when the CMV is in motion, but when it is temporarily stopped in a traffic jam or at a traffic light. The only time CMV drivers can use a handheld cell phone is when they move to the side of the highway and stop, or if they move off the highway altogether. 46 A handheld cell phone can be used only if the CMV is in a parked position, not on a roadway. Further, employers of CMV drivers cannot require or allow them to text or use hand-held cell phones while driving a CMV interstate. 47

Exceptions and Scope of Applicability

There is a limited exception to the prohibitions on texting and the use of handheld mobile phones when a CMV driver needs to communicate with law enforcement officials or other emergency services. 48 Additionally, the FMCSA rules only apply to drivers of CMVs while they are operating a CMV. 49 When CMV drivers are in their personal, non-commercial vehicles, the FMCSA rules are not applicable.

39 “Final Rule”, supra note 4, at 75486-87; 49 CFR §§ 383.5 & 390.5.
40 “Final Rule”, supra note 4, at 75486-87; 49 CFR §§ 383.5 & 390.5.
41 “Final Rule”, supra note 4, at 75481, 75487.
42 Id. at 75475, 75481.
43 Id.
45 “Final Rule”, supra note 4, at 75481.
46 Id. at 75476.
47 “Final Rule”, supra note 4, at 75481; 49 CFR §§ 392.80(b) & 392.82(b).
48 “Final Rule”, supra note 4, at 75481; 49 CFR §§ 392.80(d) & 392.82(d).
Fines and Penalties

If a CMV driver fails to comply with the FMCSA rule prohibiting the use of handheld cell phones, both the driver and his or her employer are subject to fines and penalties. If a CMV driver commits a violation, a fine of up to $2,750 can be imposed on a CMV driver for a violation. Additionally, a fine of $11,000 may be imposed on an employer who fails to ensure compliance with the rule. Employers fail to ensure compliance if they allow or require a CMV driver to use a hand-held cell phone to text or call while driving.

Multiple violations of the rule may result in CMV driver disqualification. Disqualification means that the driver is not allowed to drive a CMV. If a CMV driver commits two or more violations of the FMCSA rule within three years, he or she will be disqualified from operating a CMV for at least 60 days. If a CMV driver commits three or more violations of this FMCSA rule in a three-year period, he or she will be disqualified from operating a CMV for at least 120 days.

CDL holders are also subject to driver disqualification by a state if they are convicted of two or more state or local laws that classify as serious traffic violations. By virtue of the rule, it is now a serious traffic violation if a CDL holder is convicted of a state or local law that restricts the use of handheld mobile telephones while driving. Therefore, a CMV driver will be disqualified from operating a CDL-required CMV for at least 60 days if he or she commits two serious traffic violations of state or local law in a three-year period. A CMV driver will be disqualified from operating a CDL-required CMV for at least 120 days if he or she commits three or more serious traffic violations in a three-year period. Meanwhile, “[a]n employer must not knowingly allow, require, permit, or authorize a driver who is disqualified to drive a CMV.”

Violations have another negative impact on employers, affecting their Safety Measurement System results. Violations of this rule carry the maximum severity weight.

COMPLIANCE AND ENFORCEMENT

Successful enforcement of the FMCSA rule prohibiting the use of handheld cell phones is definitely feasible. Two year-long pilot programs directed at commuters in Hartford, Connecticut and Syracuse, New York proved as much. These programs, in
conjunction with public service announcements and media campaigns, aimed to test whether increased law enforcement efforts would lead to less cell phone use by drivers.67 In Hartford alone, law enforcement cited 9,658 drivers who were given citations for texting or talking on cell phones while driving.68 In Syracuse, drivers received 9,587 citations for illegal phone use.69 The results indicated that texting and handheld cell phone use decreased by one-third in Syracuse.70 Enforcement had an even larger effect in Hartford, where texting while driving decreased by almost 75 percent, and handheld cell phone use behind the wheel dropped 57 percent.71 The programs proved that tough laws, strong and highly-visible enforcement and public awareness can decrease the use of handheld cell phones while driving and help reduce accidents.72 As of December 2, 2011, FMCSA reported that there had been over 300 reported violations of the texting rule at roadside during the first thirteen months of its implementation.73

Compliance and Enforcement by Employers

As stated above, employers are also liable if their CMV drivers violate the FMCSA rule, or state or local laws prohibiting the use of handheld cell phones while driving. As a result, while the FMCSA rule does not identify the specific steps that employers must take in terms of company policy or training to enforce the FMCSA rule, it does require some company action to attempt to ensure that their employees comply with the restrictions on cell phone use.

First, the FMCSA has stated that “a motor carrier should put in place or have company policies or practices that make it clear that a carrier does not allow or require hand-held mobile phone use while driving. A motor carrier is responsible for the actions of its drivers.”74 Any such policy should describe both the prohibited behaviors associated with handheld cell phone use and the consequences of engaging in such behaviors. It may also include incentives for complying with the policy.75

The FMCSA rule has so far prompted a number of employers of CMV drivers to promulgate written policies that define what constitutes acceptable use of cell phones by their employees while driving.76 Of these written policies, 45 percent prohibit all use of cell phones while driving unless the phone is hands-free, while 41 percent prohibit the use of cell phones altogether, whether hands-free or not.77 In contrast, 12 percent of the written policies reported by CMV driver employers prohibit only texting or browsing the

68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
73 “Final Rule”, supra note 4, at 75478.
74 Id.
77 Howard & Riemer, supra note 75, at 11.
Internet while behind the wheel.\textsuperscript{78} This latter policy does not assure compliance with the FMCSA rules.

It should be noted that an employer’s implementation of a cell phone use policy, while essential, is not sufficient on its own to ensure compliance with the rule and to avoid liability due to a CMV driver’s violation of the FMCSA rule.\textsuperscript{79} In fact, only 32 percent of employers responding to a recent survey reported that they were “very confident” that their distracted driving policies are effective.\textsuperscript{80} Such being the case, it is recommended that employers of CMV drivers have them sign a written acknowledgement that they agree to, and understand, the policy.\textsuperscript{81}

It is also recommended that employers of CMV drivers have regular communication with and training for them on handheld cell phone use while driving a CMV.\textsuperscript{82} Finally, employers should implement technology enforcement tools to encourage compliance with the rule or with relevant state and local laws regarding cell phone use while driving.\textsuperscript{83}

Employers can also implement either passive or active technological tools to promote a CMV driver’s safe and legal use of cell phones while driving a CMV.\textsuperscript{84}

**Passive Technological Tools:** Passive policy software is effective when used by a company where the CMV driver carries a personal cell phone and the vehicles are equipped with telematics systems.\textsuperscript{85} This software analyzes and compares cell phone billing records with vehicle trip data to measure and report an employee’s cell phone use while driving a CMV.\textsuperscript{86} Passive compliance tools involve three components: (1) recording the employee’s driving data, such as where and when the trips started, the road taken, and when and where the trip stopped; (2) recording employee phone usage data while driving; and (3) maintaining a secure portal for dashboard reporting and risk analysis.\textsuperscript{87}

The accessibility of employee phone usage data depends on the type of cell phone the driver is using. If a CMV driver is using a company-owned cell phone, the phone usage data is company billing data and belongs to the employer.\textsuperscript{88} An employer can easily access this data with a simple letter of authorization from the employer to the telephone company.\textsuperscript{89} Phone usage data is less accessible if a CMV driver is using a personal cell phone while driving.\textsuperscript{90} Under the Federal Credit and Reporting Act, an employer can only access billing data from an employee’s personal cell phone with the employee’s authorization.\textsuperscript{91} If the employee provides authorization, an employer can obtain this data through the telephone company’s secure website’s automated process.\textsuperscript{92} The process of

\textsuperscript{78} Id.
\textsuperscript{79} See id.
\textsuperscript{80} “2013 Survey”, supra note 76.
\textsuperscript{81} Howard & Riemer, supra note 75, at 11.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 11-12.
\textsuperscript{88} Id. at 12.
\textsuperscript{89} Id.
\textsuperscript{90} See id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
obtaining such data is analogous to the process followed by an employer that requires its employees to submit personal data regarding their DMV record, criminal history or drug testing results. 93

This method of enforcement system includes the use of fleet tracking and telematics systems such as Qualcomm, PeopleNet, and Xata, to name a few. 94 These systems record and measure the employee driving data, such as where and when a trip began and ended and the route driven, which is compared to the employee’s cell phone billing records to measure and manage a CMV driver’s cellphone use while driving a CMV. 95

**Active Technological Tools:** Active policy software solutions are available for employers whose CMV drivers have a company-owned smart phone or tablet. 96 Employers can install such software applications on their driver’s smart phone or tablet. 97 Some of these applications, such as FleetSafer Mobile with SafeApp, integrate with a service trigger (e.g. Telematics or Bluetooth technology) to automatically activate the employer’s set “policy mode” limitations when the vehicle is in motion. 98 SafeApp software allows an employer to prevent a CMV driver from accessing calls, texts, emails, the Internet browser and other applications. The employer can also use SafeApp to selectively allow certain applications that are permitted by company policy for use while driving, such as navigation. 99

Another active software application, SafeDial, not only prevents a CMV driver from texting, emailing, and browsing while driving, but also allows inbound and outbound call management. 100 When SafeDial is active on a CMV driver’s phone, all alerts and notifications are silenced and the phone’s keyboard and screen are locked. 101 This software does not affect a CMV driver’s ability to make emergency calls or engage in hands-free calls. 102 Therefore, the use of these or similar software applications can almost guarantee that an employer and its CMV drivers will comply with the FMCSA cell phone restrictions. 103

**Compliance by CMV Drivers**

The easiest way for a CMV driver to comply with FMCSA rule is to use a cell phone that has at least one hands-free feature. One compliant hands-free cellphone would have the push-to-talk function. 104 CMV drivers may also use two-way radios, walkie-talkies, or a cell phone that is mounted close to the driver. 105 Additionally, drivers may use a cell

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93 Id.
94 Id. at 11.
95 Id.
96 Id.
97 Id.
98 Id.
99 Id.
102 Howard & Riemer, supra note 75, at 12-13.
103 Id. at 13.
104 “Safe Dial”, supra note 101.
105 “FAQ”, supra note 50.
106 “Final Rule”, supra note 4, at 75475; 49 CFR §§ 383.5 & 390.5; “Mobile Phone Restrictions Fact Sheet”, supra note 44.
phone that has a speaker phone function with voice command. Some speaker phones with voice command can only make calls while others, such as the iPhone with Siri, can write text messages or more. If a driver’s speaker phone function has poor sound quality or he or she does not want to mount a cell phone, wireless technology such as Bluetooth is a good alternative. Bluetooth technology allows wireless communication between a cell phone and other products, whether the phone is in the driver’s pocket, purse, or elsewhere. If the technology is integrated with the vehicle, Bluetooth allows a driver to push a single button on the steering wheel to initiate, terminate, or answer a cell phone call. Most commercial vehicles do not come equipped with integrated Bluetooth. Nonetheless, Bluetooth products, such as headsets, can be purchased separately and integrated into the vehicle. Bluetooth products allow the CMV driver to terminate or answer calls by pushing one button on the product, and to dial by simply speaking a contact’s name or number.

Even if they intend to use hands-free cell phones or wireless technology, CMV drivers still cannot reach for their cell phone while they are driving. It is important that they remember to make sure that their cell phones are in close proximity and that any hands-free technology is turned on before driving.

Despite these suggestions, several surveys suggest that employers have been reactive rather than proactive in their efforts to enforce the FMCSA rule. For example, in February 2012, the most common employer enforcement mechanisms were “Random Safety Audits”, “Post-Crash Discipline”, and “Peer Reporting.” So far this year, 86 percent of employers surveyed reported that they had taken at least some steps toward enforcing distracted driving policies.

CONCLUSION

The FMCSA restrictions on handheld cell phone use are clearly driven by safety concerns due to distracted driving. Employers and CMV drivers alike will be held liable when the CMV driver holds and uses a handheld cell phone while behind the wheel of a CMV. While the extent of enforcement of this FMCSA rule is not yet known, there is already evidence that the FMCSA rule, combined with similar state laws, public awareness through media campaigns and visible enforcement efforts by local law enforcement agencies will achieve some measure of success in reducing the number of accidents due to distracted driving.

The FMCSA rule also, by including sanctions against employers for their drivers’ violations of the restrictions on the use of handheld cell phones, provides incentives to employers to help enforce the rule. Employers can enhance their liability position by enacting an effective written cell phone usage policy and

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107 Id.
108 Id.
109 Id.
110 Id.
111 Id.
112 Id.
113 Id.
114 “Mobile Phone Restrictions Fact Sheet”, supra note 44.
115 “2013 Survey”, supra note 76.
requiring their drivers to sign a written acknowledgment of it. Employers should also implement employee training with respect to the rule, and may also install technology in their CMV vehicles to limit or monitor their employees’ cell phone use while driving. The most effective tool, however, might be the availability for CMV drivers of hands-free cell phone features that allow them to make, receive, or initiate cell phone calls while driving without violating the FMCSA rule. One thing is clear: without an effective enforcement mechanism, it is likely that CMV drivers will continue to use cell phones, at least until they are involved in an accident or are caught by law enforcement officials.\textsuperscript{116}

\textsuperscript{116} Howard & Riemer, \textit{supra} note 75, at 10.